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**International Institutions, Public Governance and Future Regulation of Work:  
Taking Stock at the International Labour Organization's Centenary**

**Franz Ebert and Tonia Novitz**

This special issue takes the centenary of the International Labour Organization as an occasion to reflect on the roles of international institutions in governing labour standards. While at the time of its creation the ILO played a solitary role as the custodian of international labour standards, the culmination of various experiments with international regulation,<sup>1</sup> the ILO today is not the only international institution seeking to exercise governance in relation to the world of work. Instead, a number of institutional actors, both at the global and regional level, have emerged in this area, including the World Bank Group, the International Monetary Fund (IMF), the Organization for Economic Cooperation and Development, the Council of Europe and the European Union. Their activities can complement but often also compete or even conflict with those of the ILO, of which the economic and financial crisis in the Eurozone is a powerful reminder.<sup>2</sup> Meanwhile, the ILO has been struggling to ensure consensus among its tripartite constituents in the Post-Cold War-period and continues to be subject to significant internal

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<sup>1</sup> Albert Thomas, 'The International Labour Organisation: Its Origins, Development and Future' (1921) 1 International Labour Review 5.

<sup>2</sup> See, e.g., the contributions in Niklas Bruun, Klaus Lörcher, Isabelle Schömann (eds.), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Hart/Bloomsbury, 2016).

conflict.<sup>3</sup> Indeed, the ILO is reconsidering its regulatory role, not least in the light of its new ‘futures of work’ initiative.<sup>4</sup>

At the same time, the public governance of labour standards at the international level as a whole is facing new challenges. While developments such as the digitalization, automation and robotization of the productive and service economy require adjusting or even rethinking several aspects of labour regulation,<sup>5</sup> the rise of nationalist populism in a number of countries challenges both international institutions and many of their policies.<sup>6</sup> This rise in nationalist populism needs to be seen in the context of the impression shared by many that economic globalization, as it is currently framed, does not yield equitable results for a large part of the domestic populace and is

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<sup>3</sup> Anne Trebilcock, ‘The International Labour Organisation’ in Michael Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press, 2018); Janice Bellace, ‘The ILO and Tripartism: The Challenge of Balancing the Three-Legged Stool’, paper presented at ILO Law for Social Justice conference, Geneva, 16 April 2019; forthcoming in George Politakis (ed), *Law for Social Justice* (ILO, 2019).

<sup>4</sup> See *Report of the Director General: ILO Future of Work Centenary Initiative*, ILC 104th Session (ILO, Geneva, 2015), at 11, para. 47 (Web Page, 6 May 2019): <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_369026.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_369026.pdf)>. Culminating in the 2019 ILO Centenary Declaration for the Future of Work (Web Page, 10 August 2019): <[https://www.ilo.org/tokyo/WCMS\\_711674/lang--en/index.htm](https://www.ilo.org/tokyo/WCMS_711674/lang--en/index.htm)>.

<sup>5</sup> Valerio De Stefano, ‘Non-standard Work and Limits on Freedom of Association: A human rights-based approach’ (2016) 46(2) *Industrial Law Journal* 185; Antonio Aloisi, *Negotiating the Digital Transformation of Work : non-standard workers’ voice, collective rights and mobilisation practices in the platform economy* (EUI Working Paper, 2019) (Web Page, 10 August 2019): <<https://cadmus.eui.eu/handle/1814/63264>>.

<sup>6</sup> Alan Bogg and Mark Freedland, ‘Labour Law in the Age of Populism: Towards Sustainable Democratic Engagement’ in Julia Lopez Lopez (ed), *Collective Bargaining and Collective Action: Labour Agency and Governance in the 21st Century?* (Hart, 2018).

straying beyond the control of states.<sup>7</sup> In this regard, the issue of justice between states, with different degrees of wealth and influence, in the so-called Global North and Global South is accentuated.<sup>8</sup> Also, the changing geopolitical context, in particular the shifting power relations between the USA and China, is likely to impact on the ways in which labour governance is performed.<sup>9</sup> This suggests a need to inquire into the potential of states and public international institutions to contribute to social progress and tackle social inequality with a view to rendering the global economy more sustainable. A key aspect in this regard is to develop a better understanding of how the labour governance activities of certain international organizations, in particular those charged with financial and economic governance, have given rise to legitimacy issues, including their use of soft law or even non-law instruments.<sup>10</sup> Further, fathoming in more depth how public and private labour governance instruments at both the domestic and the

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<sup>7</sup> E.g. Wolfgang Streeck, *How will Capitalism End?* (Verso, 2016); see also Adelle Blackett and Anne Trebilcock, 'Conceptualizing Transnational Labour Law' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015).

<sup>8</sup> Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Harvard UP, 2016); Miriam Ronzoni, 'Global Labour Injustice: A Critical Overview' in Yossi Dahan, Hanna Lerner and Faina Milman-Sivan (eds), *Global Justice and International Labour Rights* (Cambridge University Press, 2016). See further Diamond Ashiagbor (ed), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (Hart, 2019).

<sup>9</sup> For an analysis of these developments for international economic governance see Anthea Roberts, Henrique Choer Moraes, Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3389163](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3389163).

<sup>10</sup> See Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance' (2008) 9(11) *German Law Journal* 1375.

international level interrelate appears vital for reconceptualizing transnational labour governance in a changing socioeconomic environment.<sup>11</sup>

This special issue has assembled nine articles, prepared by experts in international law, public law, and labour law. These reflect various papers and views presented at an event held in June 2018 at the Max Planck Institute for Comparative Public Law at Heidelberg on ‘Transnational Labour Law in an Era of Rising Nationalism: A New Role of Public Institutions for Sustainable Market Practices?’<sup>12</sup> In this sense, this collection of articles is the culmination of ongoing and significant collaborations as well as individual scholarly exercise.

### *Thinking about the ILO*

In 2015 the ILO Director-General Guy Ryder launched the ILO Future of Work Initiative and in 2017 established a Global Commission to carry the work forward and report back in 2019. It is not unusual for ILO Directors to seek revitalization and renewal of the Organization at various junctures. Key instances were the Declaration of Philadelphia of 1944 which established the Organization’s human rights credentials and preoccupation with freedom of association in the post-war period, the Declaration on Fundamental Principles and Rights at Work 1998 which instantiated Director-General Michel Hansenne’s determination to focus on ‘core labour standards’, and the Declaration on Social Justice for a Fair Globalization of 2008 which gave expression to Director-General Juan Somavia’s ‘decent work agenda’. Now we have the

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<sup>11</sup> See Benedict Kingsbury, Nico Krisch and Richard B. Stewart, ‘The Emergence of Global Administrative Law’ (2005) 63(3&4) *Law and Contemporary Problems* 15.

<sup>12</sup> This seminar was also supported by the University of Bristol and the EU Horizon 2020 project on Sustainable Market Actors for Responsible Trade (SMART) as well as the German Research Foundation (DFG).

Centenary Declaration on the Future of Work of 2019, which reflects current labour governance concerns including a preoccupation with the future of work and sustainability objectives.

The first article in this special issue examines and deploys a Polanyian analysis in *The Great Transformation*<sup>13</sup> to assist in investigating the ILO's past operations and predicting what might be the Organization's future orientation. Tonia Novitz argues that the constitutional statements made through ILO Declarations reflect countermovements to market dominance. She also points to the ways in which the three pillars of sustainability (environmental, social and economic), manifested in the 2015 United Nations (UN) General Assembly Resolution *Transforming our world: the 2030 Agenda for Sustainable Development*<sup>14</sup> can be mapped onto Polanyi's three fictitious commodities (land, labour and money) to the extent labour can be understood as emblematic of social concerns. She claims that despite current criticism of the weakness of tripartite public governance at the ILO, the Organization's current emphasis on social justice and sustainability in the 2019 Centenary Declaration, and the nascent emergence of a Universal Labour Guarantee, could provide significant resistance to the economic orthodoxy regarding the future of work promoted by the World Bank Group and the Organisation for Economic Cooperation and Development (OECD). However, as there is no smoke without fire, this narrative of ILO countermovement also exposes a lack of balanced regulation of work on the world stage which is prompting this response.

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<sup>13</sup> The primary source being Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (Beacon Press, 2001, 2<sup>nd</sup> paperback ed).

<sup>14</sup> A/Res/70/1 available at <https://sustainabledevelopment.un.org/post2015/transformingourworld/publication>.

Evidence of that imbalance is also identified by Janelle Diller, in her article on ‘The Role of the State in the Exercise of Transnational Public and Private Authority over Labour Standards’, which views the current rise in nationalism as a symptom of the weakness of transnational governance. She tracks the influence of the ILO in four instances of blended transnational public and private governance, alongside that of the State. In so doing, she points to the value of a mechanism for State accountability at the international level, including within but also beyond the ILO.

*Other international institutions and their relationship with the ILO*

Diller’s contribution highlights the variety of mechanisms at play transnationally seeking to regulate labour, while Henner Gött interrogates more precisely the ‘interactions between international organizations’, describing them (we think accurately) as a ‘neglected governance dimension’. He recognizes that inter-organizational interactions, whether intentionally or accidentally, can considerably affect the performance of each organization’s mandate, sometimes expanding their outreach and impact, but also potentially diluting, diverting or thwarting their activities and their functioning. Gött considers a range of institutional connections, notably with the International Maritime Organization, the European Court of Human Rights and the World Bank and notes, with regard to the latter, a normative deflection of international labour standards through the Doing Business Index. Rather than calling for normative hierarchy in which ILO norms would straightforwardly prevail, Gött argues for a more systematic analysis of these institutional interactions and communications, with a view to considering a suitable response.

Franz Christian Ebert, when considering ‘A Public Law Perspective on Labour Governance by International Financial Institutions’, focuses on the World Bank’s sister institution, the International Monetary Fund (IMF). He offers an analysis of the ways in which the IMF exercises labour governance through Article IV Consultations, which may then have palpable effects on workers and the conditions under which they work at the national level. While not containing any legal obligations, Ebert highlights the ways in which the Article IV staff reports, as endorsed by the IMF Executive Board constitute, in particular regarding low-income countries, an exercise of international public authority due to the significant factual effects they may entail. He examines the legitimacy issues that arise from this exercise of public authority, the legitimacy of that mechanism and, drawing on different public law approaches, then explores how such legitimacy issues could be addressed. This would involve framing the IMF’s Article IV consultations in terms of substantive requirements, including those elaborated by the ILO and reflected in the UN Sustainable Development Principles, as well as procedural requirements, revolving around the principles of transparency, participation, and review, among others.

Gabriele Buchholtz considers how international social and labour standards have been incorporated into the OECD Guidelines for Multinational Enterprises (MNEs), considering the ways in which this may enable more effective enforcement of international labour standards. She notes that most of the provisions relating to labour in the Guidelines are directly drawn from ILO instruments,<sup>15</sup> especially following its 2011 iteration, and the ways in which they reflect ILO

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<sup>15</sup> Citing Ashley L. Santner, ‘A Soft Law Mechanism for Corporate Responsibility: How the Updated OECD Guidelines for Multinational Enterprises Promote Business for the Future’ (2011) 43(2) *George Washington International Law Review* 375 at 377.



Core Labour Standards otherwise set out in the ILO Declaration on Fundamental Principles and Rights at Work 1998 and reaffirmed in the Declaration on Social Justice for a Fair Globalization 2008.<sup>16</sup> She also highlights the ways in which labour rights as human rights have come under threat, as part of economic globalization, particularly in the so-called Global South. While she does not regard the Guidelines as a panacea, she considers that they can have a palpable impact beyond the traditional categories of soft law and binding state law. In particular, she sees possibilities for innovative national regulatory practice, including the technique of ‘social linkage’, in public procurement law, which we have also seen at play in the UN Guiding Principles for Business and Human Rights.<sup>17</sup> This is a more positive interaction between the ILO and other institutions than that identified by Ebert and even Gött.

### *Enforcement of ILO norms*

Efficacy of ILO standards might indeed be realized by their dissemination in other contexts, beyond international organizations, although the risk remains that, without the institutional weight of the ILO behind them, such standards may then be undermined rather than enhanced. This is the note of caution sounded by Joo-Cheong Tham and Keith Ewing. They observe the significant increase of provisions dealing with labour standards in trade agreements,<sup>18</sup> but doubt that these labour provisions will actually enhance protections for workers. Their discussion

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<sup>16</sup> See paragraph one of the Chapter on Employment and Industrial Relations in the OECD Guidelines for Multinational Enterprises.

<sup>17</sup> Cf. Olga Martin-Ortega and Claire Methven O'Brien, ‘Advancing Respect for Labour Rights Globally through Public Procurement’ (2017) 5(4) *Politics and Governance* 69.

<sup>18</sup> See also ILO, *Assessment of Labour Provisions in Trade and Investment Arrangements* (ILO, 2016) 22-23.

centres on the ‘Labour’ chapter of the Comprehensive Progressive Trans-Pacific Partnership (CPTPP), which relies on the very broad rights set out in the ILO Declaration on Fundamental Principles and Rights at Work 1998. Tham and Ewing observe how this generality is exploited alongside the flexibility offered by the extant provisions including vague and strongly qualified obligations. As the parties to the CPTPP have not ratified the core ILO Conventions on which the labour principles are based, and are even in clear breach of those Conventions relating to freedom of association, the integrity and purpose of the ‘Labour’ chapter is called into question. It may be better described as a form of neoliberal regulation – faux regulation – enabling ‘a system of mutually assured non-compliance’.

If trade sanctions cannot provide an effective mechanism, a safer home for enforcement of ILO standards might lie within the UN system. Petra Herzfeld Olsson in her unpacking of the treatment of migrant worker rights at the ILO and elsewhere in the international community, points to overarching issues regarding enforcement. She highlights the importance of the equal treatment principle, but notes that this requires more active engagement on behalf of the ILO’s supervisory bodies in terms of the comments made to State parties and the measures recommended. In this process, she observes that the ILO labour standards and findings of ILO supervisory bodies do have some influence on the UN Committee of Migrant Workers, but not so much in relation to the ILO Conventions on labour migration but as regards other parts of the ILO’s comprehensive standard setting acquis. In this way, the ILO as a tripartite body with a long experience of regulating and monitoring working conditions, is viewed as a significant basis for norm-setting, but this arguably only takes us so far.

A bolder proposal is the partial redesign of the ILO supervisory system, which could emerge through ‘The Prospect of a Transnational Labour Inspectorate System’ as proposed by Antonio García-Muñoz Alhambra, Beryl Ter Haar and Attila Kun. They explain why labour law enforcement needs to be relocated from the national to the international level, now that the increased globalisation of the economy has created a decoupling between national labour laws and supranational economic actors. They suggest that this regulatory gap could be filled by a credible and publicly rooted transnational inspectorate system that could complement the efforts of the national systems of labour inspection when dealing with cross-border situations or transnational instruments. The authors argue that such a function would best be integrated into the ILO’s portfolio of activities and make specific recommendations as to how this proposal could be operationalized. Their analysis is linked to recent policy initiatives, including the determination to create a European Labour Authority, but also to the broader academic debate on the role of public institutions in transnational labour law. Their proposal for a transnational labour inspectorate, developed from their previous exploration of this possibility,<sup>19</sup> is highly compelling (at least to us as editors), but seems unlikely to be accepted in the ILO tripartite frame given the current resistance of the employers’ group to effective ILO standard implementation.

*Moving from public to private governance – not so simple?*

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<sup>19</sup> García-Muñoz Alhambra, Manuel A, Beryl ter Haar and Attila Kun, ‘Independent monitoring of private transnational regulation of labour standards: A feasible proposition for a “transnational labour inspectorate” system?’ in Edoardo Ales and Iacopo Senatori (eds), *The Transnational Dimension of Labour Relations: a New Order in the Making?* (G. Giappichelli Editore, 2014) 254.

The proposal from Alhambra, Ter Haar and Kun offers the promise of public authority *par excellence*. But should we rather look towards the private domain, given the obstructions we have already observed in public institutions for transnational labour governance? Here, we can return to Diller's comparative review of case-based typologies with differing degrees of public-private interaction and levels of governance. Her article analyses public action to recognize and share authority with organized bodies of collective private interest. Her conclusion is that while the engagement with private actors can be fruitful, the success of these transnational endeavours to promote labour standards relies also on public governance and its authority.

Reingard Zimmer is more positive in her exploration of 'International Framework Agreements: New Developments through better Implementation on the basis of an analysis of the Bangladesh Accord and the Indonesian Freedom of Association Protocol'. International Framework Agreements (IFAs) or, as they are commonly also known now, Global Framework Agreements, are negotiated between global union federations (GUFs) and MNEs. In this sense, they can be understood as agreements between private actors. GUFs initiated these agreements in response to purely private one-sided corporate governance policies, which tended to prioritize labour rights other than freedom of association,<sup>20</sup> seeking instead to ensure incorporation of basic ILO standards. Zimmer examines the contemporary application of the IFA concept to the Indonesian Protocol on Freedom of Association and the Bangladesh Accord, which may not make the same concrete reference to ILO Conventions found in other IFAs, but have more specific mechanisms

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<sup>20</sup> Bob Hepple, 'New Approaches to International Labour Regulation' (1997) 26 *Industrial law Journal* 347 at 364; and Bob Hepple, 'A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct' (1999) 20 *Comparative Labor Law and Policy Journal* 347 at 358.

for implementation. She suggests that these may change the paradigm for IFAs which were previously considered merely to operate as legally unenforceable agreements on the world stage. While this offers new possibilities and models for regulation, we heed the concerns voiced by Diller. There is significant evidence that many extant private labour governance instruments are themselves fraught with design and implementation problems and have had a mixed record in terms of improving labour standards on the ground.<sup>21</sup> We thus suggest that the aforesaid new private arrangements will require further scrutiny, also in the light of the increasingly uneven power balances between trade unions and employers.

### *Conclusion*

Our joint aim as editors and authors of this special issue has been to contribute to a rapprochement between public international law and labour law discourses, which often unfold in relative isolation from each other. Some papers address explicitly the regulatory role of the ILO at a time of uncertainty and change, suggesting ways in which it might reclaim and revitalize its mission (Novitz), facilitate hybrid forms of public and private governance (Diller), build relations with other institutions (Gött), and even revive its enforcement functions (Garcia-Munoz, Ter Haar and Kun). The concrete consequences for those affected by regulatory

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<sup>21</sup> See William E. Scheuerman, 'False humanitarianism?: US advocacy of transnational labour protections' (2001) 8 *Review of International Political Economy* 359 at 363-367 as well as Niklas Egels-Zandén and Henrik Lindholm, 'Do codes of conduct improve worker rights in supply chains? A study of Fair Wear Foundation' (2015) 107 *Journal of Cleaner Production* 31; Dima Jamali, Peter Lund-Thomsen, and Navjote Khara, 'CSR Institutionalized Myths in Developing Countries: An Imminent Threat of Selective Decoupling' (2017) 56 *Business & Society* 454.

practices are examined in many of the papers, but the direct focus on migration (in Herzfeld Olsson) is timely, being one of the most controversial issues of our time, testing the supervisory role of the ILO and other UN institutions. Other papers explore more diverse possibilities of labour governance, such as indirect regulation by international economic institutions including the International Monetary Fund (Ebert), the role of the OECD Guidelines for MNEs (Buchholtz), the inclusion of labour standards in trade agreements (Tham and Ewing), and even an expansion in the role and functions of international framework agreements (Zimmer). These contributions speak to the diversity of regulatory methods, but also the challenge for the ILO to offer meaningful guidance to these diverse international regulatory mechanisms.

We leave the reader with the thought as to whether we can and should be seeking to unify the varieties of forms of public governance at play on the global stage and, if so, how such unification should be brought about. Is the diversity of public governance mechanisms which communicate with the ILO, but do not necessarily simply follow its normative bidding, only detrimental for the protection of labour standards or could it turn out to be advantageous in certain respects? Might this allow for regulatory experimentation and even a pressure on the tripartite constituents of the ILO to be proactive in turn? We acknowledge that these are very different questions to those that were being asked in 1919, and such questions may not easily be answered in 2019. However, we suspect that they are likely to dominate the years ahead.